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MICHAEL RODAK, JR

No. 80-148

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE TO OPPOSITION

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I

STATEMENT OF THE CASE

Petitioner believes it appropriate to point out that despite the existence of facts from which the argument might be made, the prosecuting authority has never claimed that the challenged search was consented to. Under California law the consent issue is thus out of the case and cannot bar a remedy

petitioner is otherwise entitled to.[1] Lorenzana v. Superior Court (1973) 9 C.3d 626, 640, 511 P.2d 33.

II

NEW DISAGREEMENTS IN THE COURTS OF APPEALS

As stated in Points II and III of the petition, the appropriate Fourth Amendment tests for packages seized contemporaneous with an arrest are subject to diverse and conflicting interpretations. Recent cases exacerbate the problem.

In United States v. Sanders, ___ F.2d ___ (8th Cir., 8/15/80) an opaque brown paper envelope was seized from the floor of an automobile after an arrest. There was probable cause that the arrested parties were dealing in contraband drugs. Appellant

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[1] The Attorney General has not argued consent in this Court either in answer to Robbins' first petition (Robbins v. California (1979) 443 U.S. 903) or in answer to this one. The point must be mentioned, however, because the Attorney General has mentioned certain facts which may suggest that there was consent.

argued that the warrantless search of the envelope was improper as "the incriminating nature of the brown packet was immediately apparent to the DEA agent." A dissenting judge responded:

> Furthermore, the incriminating nature of packet was not immediately apparent. The majority's rather surprising contrary conclusion should give pause to anyone who, for example, uses such packets to carry valuable stamps and coins or receives a watch back from a repair shop in such an envelope. The agents did indeed suspect narcotics traffic in the car, but they would have also suspected that any suitable container in the car, no matter how innocent in appearance, was being used for narcotics.

In United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) (cited by both parties) a new opinion was issued, United States v. Dien, 615 F.2d 10 (1980). The new opinion requires a warrant for closed cardboard boxes when they are sealed with tape. Petitioner's packages were also sealed with tape and were made of heavy plastic, not "garbage

bags" as suggested by the Attorney General. Subjective and objective expectations of privacy are indicated by taping a package and these expectations are given weight by the circuit courts. United States v. Allison, 619 F.2d 1254 (8th Cir. 1980).

On the other hand, the Seventh and Tenth Circuits have recently held that no warrant need be obtained for paper bags or unsealed plastic bags. United States v. Garza-Hernandez, 623 F.2d 496 (7th Cir. 1980); United States v. Montgomery, 620 F.2d 753 (10th Cir. 1980).

We believe these recent cases emphasize our point that warrantless container searches involving automobiles is a volatile subject in state and federal courts.

We note that the Attorney General has failed to respond to our point that the court below did not follow this Court's mandate. There is no response possible as it cannot be denied that the court below

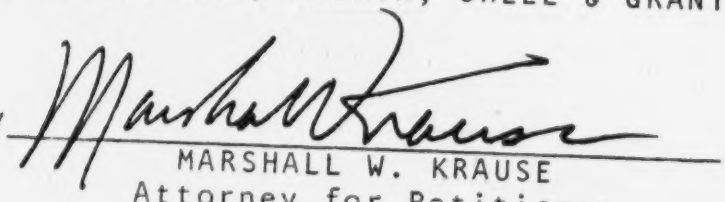
reached out for a totally new ground in re-affirming petitioner's conviction.

Dated: November 7, 1980

Respectfully submitted,

JOSEPH G. BAXTER,

MARSHALL W. KRAUSE,
KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By 
MARSHALL W. KRAUSE
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, California, in which county the within mentioned mailing occurred, and not a party to the subject cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On November 7, 1980 I served the within Response to Opposition on the respondent to said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully pre-paid, in the United States mail at Larkspur, California, addressed as follows:

Attorney General of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 1980, at Larkspur, California.